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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1137

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services,

Appellant,

against

RONALD MILNE, DOUGLAS STREETER, ROBERT C. LEE, JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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ABE LAVINE,* individually and in his capacity as Commissioner of the New York State Department of Social Services,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

The opinion of the three-judge District Court for the Southern District of New York in *Milne, et al.* v. *Berman,*

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* On July 31, 1975, Stephen Berger succeeded Abe Lavine as Commissioner of the New York State Department of Social Services. He is automatically substituted as appellant pursuant to Rule 48 of the rules of this Court.

et al., dated November 11, 1974, granting declaratory and injunctive relief (A. 563-78) is reported at 384 F. Supp. 206.

The memorandum opinion and order of the three-judge District Court dated January 22, 1975, granting a partial stay pending this appeal (A. 699-700) is not reported.

Jurisdiction

The final judgment and order appealed from was entered in the District Court on December 13, 1974 (A. 581-3). The notice of appeal to this Court was filed in the District Court on January 10, 1975 (A. 701-4), the jurisdictional statement was filed March 10, 1975, and probable jurisdiction was noted on June 30, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statute and Regulation Involved

New York Social Services Law § 131(11) provides:

"Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation. Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person."

18 New York Code of Rules and Regulations § 385.7, Regulations of the New York State Department of Social Services, provides:

"Sanctions. (a) a person who:

(1) voluntarily terminates employment or reduces his earning capacity for the purpose of qualifying for assistance or a larger amount thereof; or

(2) without good cause fails or refuses to undergo a necessary medical examination or treatment; or

(3) is required under this Part to receive manpower services and certification and without good cause fails or refuses to accept manpower services and certification; or

(4) is required under this Part to pick up his check semi-monthly at the State Employment Service and without good cause fails or refuses to do so; or

(5) without good cause fails or refuses to accept referral to and participate in a vocational rehabilitation program, shall be disqualified from receiving assistance for 30 days thereafter and until such time as he is willing to comply with the requirements of this Part, except that an applicant for or recipient of HR who voluntarily terminated employment or reduced his earning capacity shall be disqualified from receiving assistance for 75 days thereafter and until such time as he is willing to comply with the requirements of this Part."

Questions Presented

1. Whether the Constitution of the United States prohibits a state legislature from defining eligibility for assistance in a totally state-funded program by the use of a rebuttable presumption when the fact to be proved is

logically connected to the facts giving rise to the presumption and when the fact to be proved is entirely within the knowledge and control of the applicant?

2. Whether an applicant for public assistance who could present evidence to overcome a rebuttable presumption as to his eligibility to the local social services agency at any time is deprived of due process of law because a state fair hearing decision may be rendered as long as 90 days after request?

3. Whether the Court below had the power to enjoin state statutory provisions affecting applicants for AFDC when there were no plaintiffs who were applicants for AFDC, when the provisions affecting AFDC applicants are substantially different from those affecting HR applicants and when it did not examine the applicable federal law which affects the eligibility of AFDC applicants?

Statement

This appeal is from the final judgment and order (A. 581-3) of a three-judge District Court for the Southern District of New York (OAKES, C.J., BONSAL, WYATT, D.JJ.) entered December 13, 1974, which declared a state statute (N.Y. Social Services Law [NYSSL] § 131[11]*) and regulation (18 N.Y. Code of Rules and Regulations [NYCRR] § 385.7) invalid insofar as they provide (NYSSL § 131[11] *ante* at p. 2):

> ". . . Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person."*

* When the District Court refers to NYSSL § 131(10) it refers to the present subdivision (11) which was renumbered without substantive change by L. 1974, Ch. 621 § 2.

The order permanently enjoined appellant and the other defendants from enforcing the statute and regulation declared invalid. The other defendants, the Commissioners of Social Services in Westchester and Ontario Counties who were charged with the application of the invalidated statute and regulation, did not appeal separately from the judgment.

A. State Statute and Regulation

The statute and regulation that were declared partially invalid by the District Court condition eligibility for public assistance for persons who have recently voluntarily terminated employment. If that termination is for the purpose of obtaining public assistance or an increased grant, the person is not eligible for assistance for seventy-five days. The statute creates a rebuttable presumption that if there is a voluntary termination of employment and an application for public assistance within seventy-five days, the purpose of that termination was to receive public assistance. It specifically provides that the applicant can introduce evidence to show that that was not his purpose.

Rebuttal evidence may be produced at the local Social Services office at the first interview or at any time thereafter, just as any verification of data relating to eligibility may be produced. 18 NYCRR §§ 351.1(a)-(b); 351.2(a)-

* The parallel regulatory language contained in 18 NYCRR § 385.7 is reproduced at the beginning of this brief, *ante* at p. 3, *supra*.

(e)(1); 351.5—351.6(b); 351.8; 370.4(a), (b).* The applicant always bears the burden of proving eligibility. See, e.g., 18 NYCRR §§ 351.1(b)(2), 370.4(a), (b) (*post* at pp. 1a, 6a-7a). Production of information relating to employment is specifically required. 18 NYCRR §§ 351.1(b)(2)(ii)(f); 370.4(b) (*post* at pp. 1a-2a, 7a). The purposes behind a person's terminating his employment are always within his knowledge and frequently unknown to others.

As part of its general policy of requiring all able-bodied persons to support themselves,** the Legislature limited eligibility of persons who had voluntarily terminated their employment to those who did so without intending to rely on public assistance and to those who have been unemployed for 75 days or longer. NYSSL § 131(11).

This limitation applies to applicants for home relief, whose eligibility is defined (NYSSL § 158[a]***):

> Any person unable to provide for himself, or who is unable to secure support from a legally responsible relative, who is not receiving needed assistance or care under other provisions of this chapter, or from other sources, shall be eligible for home relief."

Such persons, by definition, are not eligible for categorical assistance under the Federal Social Security Act, and the grant of assistance is solely a question of state

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* These sections of the Regulations of the New York State Department of Social Services are attached as an appendix to this brief, *post* at pp. 1a-7a.

** E.g. L. 1968 ch. 931; L. 1970 chs. 566-568; L. 1971 chs. 101, 102, 946; NYSSL §§ 131(4), (5) (eligibility), 159, 164 (work relief), 349-a (income exemption), 350-b-i (work incentive), 350-k (public work projects). Also see *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973).

*** New York's Social Services Law appears as Book 52-A of McKinney's Consolidated Laws of New York Annotated and in the 1974-1975 supplement thereto.

legislative policy. Specifically, these persons are not dependent children or their guardians (42 U.S.C. §§ 601 et seq.) or aged, blind or disabled (42 U.S.C. §§ 1381 et seq.) and thus have no inherent impediment to self-support. In fact, as far as Congress is concerned, whether they are unemployed, are fired, or quit their jobs, they are not eligible for federal assistance.

The statute also applies to recipients of Aid for Families with Dependent Children (hereinafter AFDC). NYSSL § 131(11). The presumption is qualified by the phrase—"unless othewise required by federal law or regulation." *Id.* The Commissioner of Social Services interpreted the New York Statute in conjunction with 42 U.S.C. § 607(b)(1), 45 CFR § 233.100(a)(3)(i)(ii), which define families as eligible for AFDC for unemployed fathers (AFDC-U) when the father has been unemployed for at least 30 days and has not within the last 30 days refused a bona fide offer of employment or training for employment. In so doing the Commissioner reduced the period giving rise to the presumption and the period of ineligibility for recipients of AFDC to 30 days. (18 NYCRR § 385.7, *ante* at p. 3). Thus, an applicant for AFDC who voluntarily terminated his employment and applied for AFDC more than 30, but not less than 75, days after that termination would not be required to rebut the presumption. Similarly, a person who did terminate his employment for the purpose of obtaining AFDC assistance would be eligible for AFDC on the 31st day after the termination. In New York, even the 30-day sanction does not apply to needy children, who are immediately eligible for assistance even though the caretaker adult voluntarily terminated employment for the purpose of obtaining public assistance. 18 NYCRR § 352.30(d). The Court below apparently did not understand the regulations since it consistently referred to the 75-day sanction period as applicable to AFDC recipients. (Op. A. 565, 569, 574, 578 n. 7; final judgment and order, A. 583).

The intent of the Legislature in enacting the provision was to deter persons from leaving employment without being able to sustain themselves for a reasonable period of time on the assumption that they would receive public support. As the Governor stated in approving the bill (L. 1971, ch. 946):

> "The bill is designed to provide increased opportunities for gainful employment to persons who are presently dependent upon the welfare system and to deter gainfully employed persons from leaving their jobs in order to obtain public assistance, as I recommended to the Legislature in my Special Message on Welfare and Work." (McKinney's Session Laws of New York 194th Session, Laws of the Regular Session, 1971, Vol. 2, pp. 2636-7.)

The Legislature found that the availability of public assistance could be a disincentive to work and self-sufficiency. This statute is precisely designed to counteract that situation, because it does not affect the eligibility of persons who lost their employment involuntarily or who terminated their employment without regard to the availability of public assistance. A further purpose was to confine the finite sums appropriated for relieving poverty to the use of persons *unable* to provide for themselves.

Although public assistance is intended to meet basic needs of persons unable to support themselves, some employable persons may voluntarily terminate their employment, intending to support themselves by public assistance. This may not be a long-term goal. They may intend only to rely on welfare until they obtain new or more desirable employment. Nonetheless, this can cause an unnecessary drain on public resources. This statute provides notice to such persons who are, by definition, deterrable that they will not be eligible for public assistance in such a situation.

This statute is a concomitant part of New York's requirements that persons able to support themselves do so. An employable person receiving assistance is required by federal, as well as state, law to register for manpower services, training and employment (42 U.S.C.A. §§ 602 [a][19], 607[b]; 45 CFR §§ 220.35, 233.11, 233.100[a][3], [5], [6], [c][1][v]; NYSSL §§ 131[5], 350-e, 350-g; 18 NYCRR §§ 385.3-.4, 385.6, 385.7, 388.2, 388.3, 388.6[g], 388.9), accept employment (42 U.S.C.A. §§ 602[a][19][F], 607[b][1][B]; 45 CFR § 233.100[a][3][ii]; NYSSL § 131[5]; 18 NYCRR §§ 352.12, 369.2[f][7], 385.3-.4, 385.6, 385.7, 388.9) and not voluntarily terminate employment (42 U.S.C. §§ 602[a][19][F], 633[g], 29 CFR § 57.13, 45 CFR § 233.11, NYSSL § 131[11]; 18 NYCRR § 385.7. A recipient participating in the mandatory Work Incentive Program (WIN) who voluntarily terminated his employment would be ineligible for 90 days and, subsequently, for 6 months. (29 CFR § 57.13; 18 NYCRR § 388.9).

This statute also complements the public policy enunciated in the Labor Law for unemployment insurance, e.g., N.Y. Labor Law §§ 501, 593(1)(a). Persons who voluntarily terminate their employment without good cause are not eligible for unemployment insurance. *Id.* The statute reflects a policy that persons are responsible for supporting themselves wherever possible. If such persons automatically were eligible for public assistance, the Social Services Law would undermine the Labor Law. By creating a period of seventy-five days of ineligibility for persons who voluntarily terminate employment without good cause for the purpose of receiving public assistance, the deterrent effect of the Unemployment Insurance Law is not diluted, while destitute persons are not permanently cut off from public welfare funds.

B. The Plaintiffs

All of the plaintiffs and applicants for intervention in the District Court were applicants for receipt of public

assistance in the HR category. NYSSL § 158 (*ante* at p. 6). Since Congress has not deemed such persons appropriate recipients of federal assistance, they are supported solely by State and local funds and eligibility for those funds is defined solely in State Law. All of the plaintiffs are individual recipients, not members of an assistance family or group.*

1. *Ronald Milne*

The original plaintiff in this case, Ronald Milne, claimed that he did not voluntarily terminate his employment but was forced to resign as a security guard at Columbia University or be faced with a charge of serious misconduct (Pl. aff. A. 11). He resigned on November 9, 1973, and was denied assistance by the Westchester County Department of Social Services on the basis of NYSSL § 131(11) on November 16, the day he applied (Pl. affs. A. 265-6, 11). He had that same day applied for unemployment insurance compensation (Pl. aff. A. 265) which was denied on November 29 (Pl. aff. A. 266).

Milne requested a fair hearing of the State Department of Social Services on December 13, and it was scheduled for January 9, 1974 (Pl. aff. A. 267); but on that date the County Commissioner reconsidered his decision and determined Milne to be eligible as of the date of application. Meanwhile, on January 3, the Department of Labor reversed its initial decision and granted Milne unemployment insurance compensation. The State Commissioner of Social Services had never taken any action against Milne and the local Commissioner conceded his error in applying the statute to him four months before the three-judge Court hearing.

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* While the Beverly brothers apparently lived together, they did not live with a caretaker relative nor seek assistance as a family. In fact, only Joseph Beverly ever applied for assistance (*post* at p. 13).

2. *Robert C. Lee*

Intervention on the part of Robert C. Lee was ordered by Judge Wyatt on March 27, 1974. Lee's employment as a machinist had been terminated on January 14, 1974, " 'due to a combination of excessive excused and unexcused lateness and absenteeism which proved discriminative to . . . [the] production schedule' " (Compl't A. 79; Pl. aff., A. 63-4; Pl. aff. exh. B, A. 71). He had failed to pay his rent from November, 1973, through January, 1974, and on January 29, 1974, he applied for public assistance. The Westchester County Department of Social Services denied his application on January 31. Apparently the local agency had found that he deliberately provoked his discharge to obtain public assistance (Pl. aff. exh. C, A. 72).

On February 4, 1974, Mr. Lee filed an order to show cause and an application for a temporary restraining order in the District Court, which granted the restraining order, prohibiting the enforcement of the provisions of NYSSL § 131(11) against Intervenor Lee (Order, A. 60-2). The next day he requested a fair hearing (Op. n. 5, A. 578). The hearing was scheduled on April 4, 1974, but was adjourned upon a misunderstanding on the part of the local agency that Lee's status as a plaintiff in the Federal proceeding prevented the Department from holding a hearing on eligibility (Op. n. 5, A. 578; dft. aff., A. 450). However, during all this time Mr. Lee was receiving public assistance benefits pursuant to the District Court's order. On April 26, 1974, he defaulted at the hearing. The State Commissioner thus did not apply the challenged statute to Lee, who, receiving benefits by Court order, failed to pursue the due process hearing he claimed was his due.

3. *Douglas Streeter*

Leave to intervene as a plaintiff was also granted to Streeter on March 27, 1974 (Order, A. 49-51). On December 5, 1973, having sought public assistance after termi-

nating employment, he obtained a job at a nursing home, but failed to report to work over the New Year weekend, claiming to be ill. He reported to work on January 4, to pick up his paycheck and was notified that he had been suspended. Streeter reapplied on January 13, to the Westchester County Department of Social Services (Pl. aff., A. 227-8). On January 16, the local agency found that he was ineligible for home relief (Pl. aff. Ex. A, A. 282).

Meanwhile, on January 14, after applying for public assistance, Streeter had applied for unemployment insurance compensation. It was denied on February 7, because he had failed to call his job and because he had not been employed long enough to qualify for such compensation (Pl. aff., A. 278, 280).

On January 25, 1974, the District Court ordered that Streeter be given relief pending the decision on the preliminary injunction (Order, A. 49-51). Thereafter, on January 28, Streeter requested a fair hearing (Pl. aff., A. 280).

A fair hearing was originally scheduled on February 28, but a month's adjournment was granted to the local agency because of the pendency of this proceeding, as with Lee (*ante* at p. 11), and on assurance that Streeter was actually receiving assistance. A hearing was held on March 20 (Pl. aff., A. 280-1; deft. aff., A. 451) and on April 4, the decision reversing the local agency was rendered (Dft. aff. Ex. C, A. 459-60). Streeter was found eligible for assistance. The State Commissioner found that NYSSL § 131(11) was improperly applied to Streeter and ordered his continued receipt of assistance.

4. *The Beverly Brothers*

Four brothers, Joseph, Odell, John and Willie Beverly were granted leave to intervene as plaintiffs on the complaint that Social Services Law § 131(11) had been unconstitutionally applied to them by the Ontario County Social Services Department, making them ineligible for

public assistance (Docket entry 4/10/74, A. 5). Actually only Joseph Beverly had ever applied for public assistance (Hearing transcr. deft. aff. Ex. E, A. 475). Since only Joseph worked regularly (Hearing transcr. deft. aff. Ex. E, A. 469-70), it is not clear that the presumption contained in NYSSL § 131(11) would have been applied to the others.

Joseph Beverly quit his job with a produce company on Friday, January 25, 1974, and was paid his final wages on that day. He claimed that after eviction from one place, he had no other place to live (Pl. aff., A. 151). The following Tuesday, he applied for public assistance; it was denied on the same day. No request for a fair hearing was received until February 26. A hearing was held on March 14 (Transcr. deft. aff. Ex. E, A. 463-78) and a decision denying assistance was rendered on March 28. The Commissioner found that Joseph Beverly had a place to live and had terminated his employment for the purpose of obtaining public assistance (Dft. aff. Exs. D & E, A. 461-2, 476-8).

5. *Applicants for Intervention*

Several times during the pendency of this litigation, other persons sought to intervene as named plaintiffs. At appellees' request the appendix includes papers submitted on their behalf.

Roy Levee was the first of these (see order to show cause, A. 35-37; Levee aff., A. 38-41; Levee aff. Exs. A-C, A. 42-44, Gray aff., A. 45-8). On January 15, 1974, Levee was originally denied assistance by the New York City Department of Social Services based on NYSSL § 131(11) (*Id.*). Ten days later, that Department agreed not to subject Mr. Levee to the sanctions of NYSSL § 131(11) and intervention was denied (order, A. 104).

Shirley Miller originally sought intervention on the ground that NYSSL § 131(11) had been invoked in the

denial of assistance to her by the Dutchess County Department of Social Services (see order to show cause, A. 87-8; Miller aff. 89-94; Miller aff. Exs. A-D, A. 95-9). She later abandoned that motion.

Ethel Reid and Anthony Brownlee sought to intervene in this action on April 19, 1974 (Docket entries, A. 4, notice of motion, A. 216). Their motion was denied as moot on April 24 by Judge Wyatt (Docket entries, A. 4). In the opinion of the three-judge Court that motion mistakenly was regarded as open (Opinion, A. 574-5) and, as such, was redenied (*Id.*). At the time Ethel Reid sought to intervene she had been re-hired by her original employer and had received unemployment compensation in the interim (Reid aff., A. 289).

Anthony Brownlee did not sign any documents before the District Court. Edmund J. Byrnes, an attorney allegedly familiar with a prior proceeding, filed an affidavit and exhibits (A. 296-305) in which he stated he had not seen Brownlee for seven months before the inception of the suit into which Byrnes sought to intervene him (Byrnes aff. 296).

C. Prior Proceedings

This action was begun by Ronald Milne's filing his summons and complaint on December 19, 1973, on his own behalf and on behalf of other members of a putative "class of needy persons residing in New York State who have been or may be disqualified from receiving public assistance for a period of seventy-five days after the termination of their employment or reduction in earnings due to enforcement . . . by defendants of Section 131[11]." (Amended Complt., A. 16). Numerous proceedings involving intervention, requests for temporary restraining orders and discovery were held before the single-judge District Court (WYATT, D.J.) between January 10 and May 10,

1974, when the three-judge District Court convened, and heard arguments on the cross-motions for summary judgment and on the class action order (Docket entries, A. 1-5).

On February 20. 1974, upon the agreement of defendants, Judge Wyatt had determined that a three-judge Court should be convened pursuant to 28 U.S.C. §§ 2281, 2284 (Order, A. 100-3).

On November 11, 1974, the three-judge Court (OAKES, C.J,. BONSAL, WYATT, D.JJ) issued its opinion that the presumption contained in the second sentence of NYSSL § 131(11) and 18 NYCRR § 385.7 was unconstitutional and should be enjoined (A. 563-78). The opinion closed, "Settle an order or orders" (A. 575). Both sides submitted proposed orders differing on the definition of the class of persons affected. Appellees, relying on the Court's opinion, included recipients of AFDC. Appellant defined the class as applicants for HR, because no plaintiff had applied for AFDC, because the regulation affected AFDC recipients differently, and because federal law had an impact on the eligibility of AFDC applicants relevant to this statute which it did not have on applicants for the HR program.

Before the order was signed appellees brought a motion to cite appellant for contempt, claiming that the opinion itself was an order (A. 584-604); defendants opposed (A. 605-32).

On December 20, 1974, the Court ordered (Transcr. of hearing, A. 690):

> "Motion granted to the extent that defendant Lavine will cause to be sent a letter on or before January 6, 1975, to all those members of the class denied home relief assistance since November 12, 1974, advising such members that they may reapply for such assistance retroactive to November 12, 1974, and are free to ask for legal advice as they may see fit.
>
> "Otherwise, motion denied . . ."

On December 13, 1974, the three-judge Court had entered a final judgment and order (17a) which enjoined the operation of the statute and regulation in the case of AFDC, as well as HR, applicants (Order, A. 581-3). On January 22, 1975, upon the request of appellant, the Court stayed so much of the order as applied to AFDC applicants pending the determination of this appeal (Memo. op. and order, A. 699-700).

The notice of appeal to this Court was filed on January 10, 1975 (A. 701-4).

D. The Opinion Below

The court below invalidated the rebuttable presumption contained in NYSSL § 131(11) as violating a substantive concept of due process of law (Op. A. 569):

> ". . . because there is an insufficient connection between the known fact, that is, application for public assistance within 75 days of an appellant's termination of employment, and the fact presumed by the statute, that is, that the applicant terminated his employment for the purpose of qualifying for public assistance."

The Court stated it was not reaching the question of procedural fairness in the application of the statute or the claim under the equal protection clause that the classification of persons who voluntarily terminate their employment and contemporaneously (within 30 days for AFDC and 75 for HR) apply for public assistance was irrational (Op. A. 567, 573).

The Court based its granting of summary judgment on a finding "that poor people : . . have the same desire to work and to obtain the fruits of work as the non-poor" (Op. A. 570). That finding was itself based on two essays dealing with attitudes of and about poor people, in general (A. 571), portions of which had been reproduced as exhibits on plaintiffs' motion for summary judgment in what the

Court called a " 'Brandeis-brief.' "* (A. 573). See WORK IN AMERICA, Report of a Special Task Force to the Secretary of Health, Education and Welfare (MIT Press 1973) (Pl. Ex. A, A. 327-39); Irelan, LOW INCOME LIFE STYLES, U.S. Department of Health, Education and Welfare, Social and Rehabilitation Service, Office of Research and Demonstration (1967) (Pl. Ex. F, A. 393-407). Neither essay examined the implications of the objective criteria giving rise to this presumption—that the person voluntarily terminated his employment and contemporaneously applied for public assistance. The material quoted by the Court below was irrelevant to such persons (A. 571):

> ". . . The facts are that most poor people are not on welfare and the majority of poor people not only want to work, but do work, year round and full time . . ."

The Court suggested that the former level of assistance of $84 a month (op., A. 569) for one person in addition to a shelter allowance reflecting the actual cost** (See e.g. *Van Lare* v. *Hurley*, —— U.S. ——, 44 L.Ed. 2d 208 [1975]) was two little to attract potential recipients. Without identifying the income with which it was comparing public assistance. It concluded (A. 570):

> ". . . we think it cannot be assumed that any substantial number of people would terminate their employment in order to receive assistance . . ."

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* Those famous briefs included extensive economic data to *support* findings by State legislatures, not to outfit the judiciary as a rival in policy determination. E.g. Mason, Alpheus Thomas, BRANDEIS, A FREE MAN'S LIFE (Viking Press, 1946) pp. 245-53. The legislation which Brandeis defended had been invalidated by Courts which ". . . had confidently denied any 'reasonable' relation between the legislation and the stated objective . . ." (*Id.* at 248). Professor Mason could have been characterizing the decision below.

** That amount is free of withholding and other deductions concomitant with employment.

Yet Joseph Beverly who had been evicted for failure to pay rent (Pl. aff., A. 150) testified that it was not worth it for him to continue to work because his shelter costs were too high (transcr. dft. Ex. E, A. 473). He applied for public assistance almost immediately (transcr. dft. Ex. E, A. 467; Pl. aff., A. 151-2).

The Court also criticized the supposedly low level of grants of assistance, noting that in New York City in 1972, the average grant per HR household was $158.41 or $74.40 per person (Pl. Ex. C, A. 375; op., A. 570). However the grant level is not an accurate reflection of the income of recipients, but is frequently a supplement to diverse other sources of income. For instance, the HR category includes intact families with an employed father whose income is less than the appropriate level of assistance which the Court denigrated. In fact, of the 142, 123 individuals receiving HR in New York City in 1972, 60,531 were children (Pl. Ex. C, A. 375). Another group of HR recipient families included within the figures used by the Court are those receiving assistance in the first 30 days of the father's unemployment when they are not eligible for federally aided assistance. Such persons would have overcome the presumption attacked here.

It was the Court's opinion that the primary reasons for persons' terminating employment would be for other than obtaining assistance (A. 570). The Court went further and suggested that illness was the most common reason for termination; but the State Commissioner had issued directives stating that if the termination was because of illness the presumption was not applicable (Dft. aff., A. 447-8; dft. Exs. A & B, A. 454-8). The Court did not acknowledge this administrative directive that had been issued to prevent any further misapplication of § 131(11) such as had occurred in Westchester County in the case of Milne and Streeter (see *ante* at pp. 10, 11-12). In those cases, there was no voluntary termination and the presumption had been improperly invoked. Although the Court criticized

this misapplication (Op. A. 572, A. 577 n. 4), the holding rests squarely on a finding of invalidity of the statute on its face.

While not strictly relating its statement to any legal conclusion, the opinion disapproved of the length of time that the presumption applied—"to the hungry 75 days is sufficient time in which to starve" (A. 572). Nonetheless, the Court similarly enjoined the 30-day presumption applicable to AFDC cases, without any discussion (A. 569, 574). Furthermore, the facts of the plaintiffs' cases did not support the Court's theory that the statute was regularly applied to persons who terminated employment and ". . . subsequently become . . . impoverished." The longest any named plaintiff waited to apply for public assistance after termination was 15 days, in the case of Lee (*ante* at p. 11). Joseph Beverly applied on the second business day after receiving his last pay (*ante* at p. 13); Milne applied 7 days after termination (*ante* at p. 10) and Streeter, 9 days (*ante* at p. 12).

Although the Court did not evaluate the hearing procedures the writer of the opinion stated in the margin (A. 577 n. 5):

> "In practice, however, this 'rebuttable' presumption becomes irrebuttable. Once a person has been denied Home Relief, he may refute the statutory presumption at a subsequent hearing. Plaintiffs' affidavits indicate that the hearing is normally scheduled three to four weeks after it is requested. Under existing procedures, defendants then have up to 60 days to render a decision. *See Nelson* v. *Sugarman,* 361 F. Supp. 1132 (S.D.N.Y. 1971). Quite obviously, a determination of whether the statutory presumption has been rebutted is totally meaningless when it occurs after the 75 day waiting period. This Catch-22 approach to procedural due process is evidenced in the record by the case of intervenor Lee."

Judge Oakes used as an example an inaccurate account of the hearing accorded Robert Lee. He criticized the lateness of the hearing (A. 577 n. 5), but Lee had been receiving assistance since the day *before he requested* a fair hearing. The intemperate criticism of the State hearing procedure is inexplicable since it was the Court's order that required Lee to receive assistance pending the final determination in this case (Order, A. 60-2). Ultimately, Lee defaulted at the hearing (*ante* at p. 11).

The only named plaintiff who was not receiving assistance at the time the fair hearing was held was Joseph Beverly and that hearing was scheduled promptly. Beverly's request was received on February 26, 1974, a hearing was held on March 14, and a decision rendered on March 28, (Dft. aff. Exs. D & E, A. 461-78).

Furthermore, the Court did not substantiate its implication that the applicant could rebut the presumption only at a State fair hearing (Op. n. 5, A. 577). Final decisions on eligibility are not to be made without full information and the applicant may request additional time for production of evidence. 18 NYCRR § 351.8 [b], [c] [3] (*post* at pp. 5a-6a). Even after termination, applicants may reapply on the basis of new evidence.

The rule upon which the Court purportedly relied to invalidate the statute was this Court's statement in upholding a rebuttable presumption in *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 19 (1931):

> ". . . The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense . . ."

The Court below also relied on two decisions of this Court invalidating presumptions because they were *irrebuttable* (A. 568-9). *United States Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973) (conclusion that a household is not in need of food stamps from fact that one person over 18 is claimed as a dependent for Federal income tax purposes by a person not a member of the household); *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (conclusion that college student is not a Connecticut resident from fact that he was not a resident the year before he was admitted).

While the Court below did recognize the common use of the rebuttable presumption where the burden is ". . . put on the party with peculiar means of knowledge" (J. Wigmore, EVIDENCE § 2486 at Vol. IX p. 275 [3d ed. 1940]), it rejected this reasoning, stating that it was ". . . a question of policy" whether to employ the presumption (Op. A. 572). Not approving of the policy adopted by the Legislature, it substituted its own.

The presumption at issue here is an evidentiary rule in an administrative proceeding (see 18 NYCRR part 351, in *post* at pp. 1a-6a) at which the applicant bears the burden of proof and of going forward. Therefore, the presumption switches neither of these burdens. Nevertheless, the Court below cited as authority for its decision three decisions of this Court concerning the validity of a presumption against a defendant in a criminal case by which the burden of proof was reversed and the special procedural rights of an accused limited (Op. A. 568). *Leary* v. *United States*, 395 U.S. 6 (1969); *United States* v. *Romano*, 382 U.S. 136 (1965); *Tot* v. *United States*, 319 U.S. 463 (1943).

On these grounds, the Court held that the statutory presumption was irrational (Op. A. 569) and enjoined its enforcement (Order, A. 581).

Summary of Argument

When an applicant for public assistance applies at a local welfare office in New York State, he is required to "furnish evidence to provide verification of those factors which affect eligibility." 18 NYCRR § 351.1(b)(2)(ii) (*post* at p. 1a). If, like plaintiffs, he is ineligible for federally aided assistance, he is an applicant for Home Relief (HR) supported by State and local funds. Eligibility is defined in State law. An applicant for HR has the "responsibility . . . to provide verified information concerning his previous maintenance, loss of income and the extent and duration of current need . . ." 18 NYCRR § 370.4(a) (*post* at p. 7a). If he voluntarily terminated his job for the purpose of obtaining public assistance, he is ineligible for 75 days. If he voluntarily quit his job less than 75 days before he applies, he is subject to the invocation of the presumption contained in NYSSL § 131 (11): He is presumed to have terminated his employment for the purpose of obtaining public assistance, unless he produces evidence to the contrary.

Far from the oppressive irrational speculation perceived by the Court below, this presumption is eminently reasonable, and simple to overcome when the facts warrant discarding it.

To begin with, the statute which the presumption supports is carefully designed to achieve valid legislative goals: (1) requiring people to support themselves for a period after voluntarily terminating their employment, (2) deterring people from voluntarily terminating employment without the means of subsistance for the near future, and (3) apportioning the finite sums available for the relief of poverty to the use of persons who are most in need and who are incapable of supporting themselves.

Secondly, the facts proven which give rise to the presumption are rationally related to the fact presumed. The

voluntary termination of a job and the application for public assistance occur in a relatively short period of time. Employment and public assistance are alternative means of support. If the applicant has voluntarily given up one means and voluntarily sought the other, it is rational to presume he intended to obtain public assistance when he gave up self-support, unless he produces evidence to the contrary.

The presumed intent need not be universally present in fact for the presumption to be constitutional; that requirement, inappropriately applied by the court below, is more suitable to irrebuttable presumptions. The District Court opinion, if upheld, would invalidate the use of a *rebuttable* presumption against an applicant for a state benefit. This Court has never invalidated the use of a rebuttable presumption in a civil proceeding. On the contrary, in cases challenging irrebuttable presumptions as criteria for eligibility, the Court has held that the remedy for unconstitutionality is to give the applicant a chance to rebut the presumption.

This statute does just that. It specifically provides that ". . . evidence to the contrary" may be supplied (NYSSL § 131[11]).

If the presumption is not justified, such evidence is easy for the applicant to produce. His own statement might be sufficient if he can explain why he terminated his employment without enough resources to support himself for more than a short time. Such evidence always is within the control of the applicant. On the other hand, it would not be feasible for the social services agency to establish affirmatively in every case the reasons why the applicant left his job. The presumption therefore renders the public assistance program administratively workable. In so doing, however, the presumption does not shift the burdens of proof and of going forward; they already are on the applicant, as is usual in application procedures. Rebuttal evidence may be introduced at any time in the local office. Even if the applicant is found ineligible, he

may again present that evidence at the fair hearing conducted by the State Department of Social Services.

The statute and regulation also apply to applicants for AFDC, but the effect on them is very different from that on HR applicants. In the case of an application for AFDC the presumption arises only if assistance is sought within 30, rather than 75, days of voluntary termination of employment, and AFDC recipients are ineligible for assistance for only 30, rather than 75, days after voluntary termination of employment (18 NYCRR § 385.7[5]) (*ante* at p. 3). The effect of this presumption on AFDC applicants is less restrictive than the absolute sanction imposed by Congress on the same family. If eligibility is claimed because a father is unemployed, the entire family is ineligible until he has been unemployed for at least 30 days. Under the WIN program, AFDC recipients are similarly sanctioned if they voluntarily terminate their employment.

The District Court not only invaded the substantive province of the Legislature, but procedurally it overreached as well. All plaintiffs and applicants for intervention were seeking assistance for themselves as individuals under the HR category. Nonetheless the District Court declared invalid separate provisions of the statute and regulation affecting applicants for AFDC.

POINT I

The rebuttable presumption governing the receipt of evidence of eligibility by a local welfare office is based on a rational relationship between the fact proven and the fact presumed.

The statutory presumption at issue (NYSSL § 131[11], *ante*, at p. 2) is directly related to its purposes: (1) requiring people to support themselves for a period after voluntarily terminating their employment, (2) deterring people from voluntarily terminating employment without

the means of subsistance for the near future, and (3) apportioning the finite sums available for the relief of poverty to the use of persons who have been unable to provide for themselves. The statute is precisely drawn to affect only the persons who could have been deterred by its provisions. The presumption is triggered only when a person *voluntarily* terminates his employment *and* within a short time applies for public assistance. The voluntary termination of employment combined with a contemporaneous allegation of destitution is some evidence that at the time of termination the applicant intended to seek public support. At the very least, there is a rational relationship between the proven fact and the presumed fact. But once triggered the statute provides that the presumption can be rebutted—an easy matter since the applicant always has the knowledge of the relevant facts.

A. A Rebuttable Presumption in a Civil Case Is Valid as Long as it Is Not Purely Arbitrary

The standard by which the validity of a rebuttable presumption is measured was enunciated by this Court in *Mobile J. & K.C.R. Co.* v. *Turnipseed* (219 U.S. 35, 43 (1910):

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of a due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense . . ."

Under that test, the presumption at issue is valid, for it is rational, and the statute specifically provides that the

applicant can produce evidence to the contrary. NYSSL § 131(11).

Turnipseed, supra, involved a wrongful death action against a railroad in which, under a state statute, "proof of injury inflicted by the running of locomotives of cars of [a railroad] company . . . shall be *prima facie* evidence of the want of reasonable skill and care." The presumption was upheld as an evidentiary rule well within the power of the state legislature (219 U.S. at 42-4).

The *Turnipseed* doctrine has been consistently followed; indeed this Court has never invalidated a rebuttable presumption in a civil case. See *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 81-3 (1911) (upholding state law that proof of pumping water from mineral springs was *prima facie* evidence that the pumping was for the purposes prohibited in a New York statute); *Reitler* v. *Harris,* 223 U.S. 437 (1912) (upheld state statute that made an entry of forfeiture on a public tax record *prima facie* evidence of lawful service of forfeiture notice); *Luria* v. *United States,* 231 U.S. 9, 25-7 (1913) (upheld Congressional statute which created a rebuttable presumption that a recently naturalized citizen had not intended to reside in the United States permanently from the fact of taking up a permanent residence in a foreign country within 5 years); *Meeker & Co.* v. *Lehigh Valley Railroad Co.,* 236 U.S. 412, 430 (1915) (upheld Congressional statute which made the findings of the Interstate Commerce Commission *prima facie* evidence of the facts found); *Hawkins* v. *Bleakly,* 243 U.S. 210, 214 (1917) (upheld state workmen's compensation statute which presumed negligence upon the part of an employer from proof of injury to the employee and proof of the employer's non-participation in the program); *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8, 18-19 (1931) (upheld state statute which provided "'The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste'" [*Id.* at 11 n. 1]);

Atlantic Coast Line R. Co. v. *Ford,* 287 U.S. 502 (1933) (upheld state statute's presumption that a railroad was negligent in a grade crossing accident upon proof of failure to give required warning signals); *Sanford* v. *Rockefeller,* 35 NY 2d 547 (1974), *app. dism. sub nom. Sanford* v. *Carey,* —— U.S. ——, 43 LW 3613 (5/19/75) (upheld a presumption that an employee was on strike from report showing absence from work during a work-stoppage. *Watson* v. *Cronin,* 384 F. Supp. 652, 658-9 (D. Colo. 1974) (upheld denial of a press card to one previously convicted felon because of his criminal record on proof that such conviction was not an absolute bar); *Turner Elkhorn Mining Co.* v. *Brennan,* 385 F. Supp. 424 (3-judge Ct. E.D. Ky. 1974), *prob jur.* noted 6/9/75 *sub nom. Dunlop* v. *Turner Elkhorn Mining Co.* (#74-1302) and *Turner Elkhorn Mining Co.* v. *Dunlop* (#74-1316), 43 LW 3644 (6/10/75) (upheld three *rebuttable* presumptions, while invalidating an *irrebuttable* presumption* contained in the Coal Mine Health and Safety Act of 1969.

Western and Atlantic Railroad v. *Henderson,* 279 U.S. 639 (1929) is not to the contrary. Justice Butler, speaking for the Court, invalidated a Georgia statute on the ground that a flat presumption of liability against the Railroad not only shifted the burdens of proof and of going forward, but was itself ". . . evidence to be weighed against opposing testimony . . ." (279 U.S. at 644). The presumption, *qua* presumption, was not invalidated. It was the use of the presumption as evidence which was found to be arbitrary. See *Atlantic Coast Line Railroad Co.* v. *Ford,* 287 U.S. 501, 508 (1933). But see *Breeden* v. *Weinberger,* 493 F. 2d 1002, 1005-7 (4th Cir. 1974) in which the use of a presumption as evidence was upheld.

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* Probable jurisdiction was granted for this Court to review both the irrebuttable presumption and the rebuttable ones. 43 L.W. 3644 (6/10/75).

In reiterating the well-established rule in favor of rebuttable presumptions, this Court has recognized the deference due the legislature in the sphere of evidentiary rules. Chief Justice Hughes stated the proposition in *Bandini Petroleum Co.* v. *Superior Court, supra,* 284 U.S. 8, 18-19:

> ". . . The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be *prima facie* evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed."

The choice of rules of evidence to determine disputes is ordinarily left to the Legislature

> ". . . *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; . . ." (Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, eighth ed., 1927 [Carrington, ed.] Vol. II at p. 766).

The Legislature which has the right to change the rules of evidence in a common law trial certainly has the same right in an administrative proceeding determining eligibility for a benefit created by that Legislature.

B. There is a Rational Relationship Between a Voluntary Termination Followed by an Application for Public Assistance Benefits and a Presumption that the Applicant Quit His Job for the Purpose of Obtaining Assistance.

The rational connection the legislature made between the facts proven and the fact presumed is plain from the language of the section and from common human experience. If a person voluntarily terminates his employment and contemporaneously applies for public support it is reasonable to presume that he intended to apply for assistance when he quit his job. The connection is partially temporal. Since both significant actions are taken in a relatively short period of time, it is reasonable to presume that the applicant intended to take the second action when he made the first move, unless he produces evidence which would disconnect the two.

This was also the rationale for the presumption upheld in *Sanford* v. *Rockefeller,* 35 NY 2d 547 (1974), *app. dism.* —— U.S. ——, 43 LW 3613 (5/19/75)—that proof of absence on the day of a strike justifies the presumption that the employee was absent for the purpose of participating in the work stoppage, unless he produces evidence to the contrary.

A temporal relationship also provides the rationale for presuming a decedent's motive in transferring an asset within 3 years of death was in contemplation of his death, in the absence of proof to the contrary. 26 U.S.C. § 2035. See *Bintliff* v. *United States,* 462 F 2d 403 (5th Cir. 1972). Compare a similar irrebutable presumption invalidated in *Heiner* v. *Donnan,* 285 U.S. 312 (1932).

The length of time between termination and application is itself a factor to be weighed by the agency in determining whether a person terminated his employment to receive assistance (Dft. Ex. A, A. 454). The time lapses between the termination of employment and application for assist-

ance in this case are very short. Plaintiff Lee waited the longest—15 days (Compl't, A. 78, see *ante* at p. 11). Joseph Beverly received his last pay on Friday, and applied for public assistance the following Tuesday (Transcr. Dft. Ex. E, A. 467, Pl. aff., A. 52). If a person is impoverished enough on Tuesday to be unable to support himself and to seek public funds it is not unreasonable to require that person to prove what he had in mind before the weekend when he quit his job and deprived himself of income. That is all that § 131(11) does.

The other connection between the facts proven and the fact presumed is the connection of necessity. A person needs income to subsist. If he voluntarily gives up his basic source of income, his job, and subsequently seeks another source of income, payments from the public treasury, it is reasonable to presume that he had that latter source of income in mind when he gave up the former, unless he produces evidence to the contrary. It is not necessary that all people in that category intended to apply for public assistance because it is a *rebuttable* presumption and, if inappropriate in a particular case, the facts to rebut it would always be in the possession of the applicant.

Thus, the presumption is rational for a third reason. The duty to produce the evidence required to overcome it does not place an onerous burden on the applicant who always knows why he terminated his employment, who bears the burden of proving each element of eligibility (18 NYCRR §§ 351.1(b)(2), 370.4(a), (b), *post* at pp. 1a, 6a-7a) and who is required to produce information regarding employment (18 NYCRR §§ 351.1(b)(2)(ii)(f), 370.4(b), *post* at pp. 1a-2a, 7a). There is no special requirement as to the character of the evidence necessary to overcome the presumption. By contrast, it would be virtually impossible for the local Department of Social Services to prove the purpose behind the applicant's terminating his employment.

The strict standard to which statutory classifications are held when they are called irrebuttable presumptions has caused this Court concern lest an extension (*Weinberger* v. *Salfi*, —— U.S. ——, 45 L. Ed. 2d 522, 543 [1975]):

> ". . . would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments . . ."

How much worse the dilemma of legislatures would be if the holding below were affirmed and rebuttable presumptions were held to the same standard. If an eligibility criterion did not universally fulfill the purposes of the statute, but the statute gave the applicant the opportunity to show that that criterion was inappropriate in his case, it still would not be upheld. Then the legislature would have lost control over determinations of eligibility for government benefits. It would be left to administrators and Courts to determine who was eligible on an *ad hoc* basis. Such a chaotic result, itself, could cause denials of due process and equal protection far more serious than that threatened here.

C. By Permitting Rebuttal, This Statute Avoids the Defects of a Conclusive Presumption

The appropriate rule for assessing the validity of the presumption contained in NYSSL § 131(11) is whether it is "entirely arbitrary" *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 19 (1932). While the Court below paid lip service to the *Turnipseed* (219 U.S. at 35, 43)—*Bandini* (284 U.S. 8. 19) rule (Op. A. 568), it actually held the statute to the far stricter standard sometimes applied to irrebuttable or conclusive presumptions, citing *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

In *Vlandis,* 412 U.S. 441 at 453, this Court held that "a permanent irrebuttable presumption of nonresidence" (*Id.* at 453) against a state college student seeking a lower rate of tuition had to be "necessarily or universally true in fact." Yet this Court just as clearly said the defect would be cured by "allow[ing] such an individual the opportunity to present evidence showing that he is a bona fide resident . . ." *Id.*

United States Dept. of Agriculture v. *Murry,* 413 U.S. 508 (1973) is to the same effect. The statute at issue rendered the appellees ineligible for food stamps because it contained an irrebuttable conclusion that a household was not needy if one person over 18 is claimed as a dependent for Federal income tax purposes by a person not a member of the household. Although the statute created an irrebuttable presumption, Justice Douglas measured it only by a standard of rationality (413 U.S. 508 at 514); but found it wanting. The critical flaw in the statute was that it deprived appellees of due process of law because the determination was made (143 U.S. 508, 513):

> ". . . without hearing, without witnesses, without findings of fact . . ."

This statute is by that token in sharp contrast to the food-stamp-eligibility provision.

In *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), this Court reiterated that it was the conclusiveness of the regulations establishing mandatory leaves for pregnant teachers which rendered them invalid; ". . . the Due Process Clause required a more individualized determination." 414 U.S. 632 at 645.

In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), this Court specifically approved a rebuttable presumption of unfitness of an unwed father, but rejected an irrebutable one (*id.* at 654-5):

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. . . .

> But all unmarried fathers are not in this category. . . . Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring." [marginal notes omitted].

In *Carrington* v. *Rash,* 380 U.S. 89 (1965), this Court struck down a Texas statute permanently prohibiting men who entered the Armed Services from another State from being eligible to vote in Texas while serving in the military. The evil was ". . . forbidding a soldier ever to controvert the presumption of non-residence." *Id.* at 96. A conclusive presumption that any gift made within two years of death was in contemplation of death was invalidated because it ". . . excludes consideration of every fact and circumstance tending to show the real motive of the donor." *Heiner* v. *Donnan,* 285 U.S. 312, 327 (1932). But a rebuttable presumption against a gift made within 3 years of death is valid (26 U.S.C. § 2035). See *e.g. Bintliff* v. *United States,* 462 F. 2d 403 (5th Cir. 1972).

New York allows the individual against whom the rebuttable presumption runs the opportunity to overcome it. Therefore, this Court's *conclusive*-presumption decisions, while providing an instructive contrast, do not govern the validity of this *rebuttable* presumption.

The only resemblance between a rebuttable presumption like that presented here and the irrebuttable ones invalidated by this Court is the semantic one. But, as Wigmore says, a conclusive presumption is not a presumption at all. J. Wigmore, EVIDENCE, 2492, at Vol. IX, p. 292 (3d ed. 1940).

D. There Are No Impediments to the Use of Presumptions in Application Proceedings Comparable to the Limits on the Imposition of a Presumption Against a Criminal Defendant

This Court has invalidated rebuttable presumptions only in criminal cases. *Leary* v. *United States,* 395 U.S. 6 (1969) (knowledge of illegal importation of marijuana presumed from its possession); *United States* v. *Romano,* 382 U.S.

136 (1965) (illegal production of liquor presumed from presence at the site of an illegal still); *Tot* v. *United States,* 319 U.S. 463 (1943) (presumption that a firearm was received in interstate or foreign commerce after the effective date of the statute from the fact that a defendant who had formerly been convicted of a crime of violence had it in his possession).

A presumption which shifts the burden of proof to an accused has an impact on rights of a criminal defendant which are specially protected by the Constitution in the Fourth, Fifth, Sixth and Fourteenth Amendments which has no analogue in Civil procedures. Last term this Court again emphasized the strictures upon the prosecution to prove every element of guilt beyond a reasonable doubt in holding that Maine could not require a homicide defendant to prove that he acted in the heat of passion. *Mullaney* v. *Wilbur,* —— U.S. ——, 44 L. ed. 2d 508 (1975). Also see *In re Winship,* 397 U.S. 358, 361-5 (1970), in which this standard was required to be used in juvenile proceedings which could result in loss of liberty for extended periods of time. The unique protections afforded a criminal accused are in marked contrast to administrative procedures governing the delivery of a government created benefit. The presumption at issue does not even shift the burden of proof (see Point IIB, *post* at pp. 51-2).

E. The Decision Below Was Unjustified by any Precedent

Two District Courts have invalidated rebuttable presumptions in civil cases. *Owens* v. *Roberts,* 377 F. Supp. 45 M.D. Fla. 1974); *De Kalb Real Estate Board* v. *Chairman and Board of Commissioners,* 372 F. Supp. 748 (N.D. Ga. 1973).

In *Owens,* two presumptions were at issue, one rebuttable and one irrebuttable. Both were invalidated. The irrebuttable presumption was contained in Division of Family Services, Reg., Ch. V § II (377 F. Supp. 46 at 48, n. 3) which provided that a fraudulent transfer

of assets is presumed from the transfer of an asset worth at least $600 for less than its value. The injunction of that irrebuttable presumption does not support the decision below. But the Court went further and enjoined the statutory rebuttable presumption of ineligibility for public assistance from the fact that a person transferred an asset within two years prior to, or during, receipt of assistance. (Fla. Stat. § 409.185[1][b], 377 F. Supp. 46 at 48, n. 2). In the Court's discussion it substituted its personal policies and perceptions of a "typical honest welfare recipient" (*Id.* at 53) for that of the Legislature, just as the Court below did.

The Florida Court also had a ground, other than unconstitutionality, for invalidating the rebuttable presumption which is not present here—non-compliance with the Social Security Act. 377 F. Supp. 46 at 54-5.

In that case, aged, blind and disabled recipients were found to be ineligible for any assistance for two years. Here an able bodied person would be ineligible for only 75 days and an applicant for AFDC for only 30 days. That is a significant distinction. In *Vlandis* v. *Kline,* 412 U.S. 441, 450-3 (1973), this Court emphasized the importance of the duration of the disability as a factor in assessing the rationality of a rule of evidence. It struck down a *permanent* rebuttable presumption of non-residence but approved a conclusive presumption of non-residence for one year. Also see *Starns* v. *Malkerson,* 326 F. Supp. 234 (3-judge Ct. D. Minn. 1970), affd. 401 U.S. 985 (1971).

In *DeKalb Real Estate Board* v. *Chairman and Board of Commissioners,* 372 F. Supp. 748 (N.D. Ga. 1973), the District Court declared a County anti-"blockbusting" ordinance unconstitutional before its effective date. The Court found the ordinance racially discriminatory in violation of the equal protection clause of the Fourteenth Amendment. It discriminated against black prospective home buyers by seeking " 'stabilization of neighborhoods' "

which has ". . . the ultimate effect of freezing in past discrimination" (372 F. Supp. 748 at 755), and it discriminated against black real estate agents because its purpose was to prevent panic selling by white families by banning the display of a "For Sale" sign with an agent's name for fear that an indication of black agents ". . . who predominantly sell only to black families" (317 F. Supp. at 755) would create such a panic. Several specific sections of the ordinance were also declared invalid for overbreadth (377 F. Supp. 748 at 755-6) and for an irrational classification which discriminated in favor of owner-sellers and against real estate agents in violation of the equal protection clause of the Fourteenth Amendment (377 F. Supp. 748 at 754).

The Georgia Court also found a deprivation of due process because of a rebuttable presumption. The presumption was used in a proceeding in the Recorder's Court in which the agent was called an "accused", "stood trial for violation" and in which he faced "conviction" (DeKalb County Ordinance, § V, 377 F. Supp. at 758-9). The penalty upon "conviction" could be suspension or revocation of his license to do business (*id.* at 758). The rebuttable presumption at issue there was that a real estate agent had violated an anti-blockbusting ordinance from the existence of a "For Sale" sign with his name located on residential real estate. The Court held that there was no rational connection between the sign and "blockbusting". It declared that section invalid, relying on criminal cases (372 F. Supp. 748, 753-4), possibly because of the quasi-criminal nature of the enforcement procedures. Because the whole ordinance was invalidated as racially discriminatory and the prohibition against placing signs was invalidated as overbroad and as denying equal protection, the significance of the due process holding is slight. The evil against which the Court was ruling was not the presumption but the ultimate finding—that the agent could lose his license for putting up a sign.

F. The Court Below Failed to Assess Rationality of the Rebuttable Presumption

Whether or not it was right in invalidating the rebuttable presumption in *DeKalb Real Estate Bd., supra,* 372 F. Supp. 748, the Florida Court asked the right question and answered it responsively—is there a rational connection between the facts proven and the fact presumed or is the presumption purely arbitrary (see Point IA *ante* at pp. 25-8). The Court below did not really ask that question and it certainly did not answer it. Its inapposite response was that most people do not leave their employment to obtain public assistance (op. A. 569-73). Citing some statistics and a smattering of reports, it concluded (A. 570):

> "We do not think it can be stated as a general rule, as the statutory presumption would have it, that poor people do not have the same desire to work and to obtain the fruits of work as the non-poor."

If that straw man were the statutory presumption at issue the materials cited would be relevant.

But the statutory presumption here is not invoked by proof of poverty. In fact it affects only a very small proportion of recipients of public assistance and an infinitesimally small proportion of poor people. Since its overriding purpose is to deter people from quitting their jobs without being able to support themselves in the near future, it is intended to affect as small a number as possible. If it works well there will be few people who will terminate employment without the ability to support themselves in the short run and, of those, fewer still who will not be able to overcome the presumption.

Furthermore, the Court below suggested that the statute was designed to change people's attitudes toward work (op. A. 569-73). But that is plainly not involved. The statute seeks to prevent objective behavior—i.e., quitting

a job without any means for self-support in the near future. It therefore would deter people with a positive attitude toward work, as well as those with a negative or indifferent attitude, and no provision of the statute rests on any perjorative assumptions about the people who might be affected.

It is for this reason that the materials submitted by the plaintiffs did not advance their argument nor support the decision below.

The excerpt from WORK IN AMERICA submitted by plaintiffs to the Court below (Exh. A, A. 327-39) and cited in its opinion (A. 570) is a philosophical discourse on the "functions of work" largely in psychological terms. The purpose of its introduction is to suggest that generalizations about poor people's unwillingness to work are not justified. It forms no basis for invalidating a specific state statute which is not in any sense based on such generalized opinions.

Low Income Life Styles by Lola M. Irelan (U.S. Dept. HEW, 1968, Pl. Ex. F, A. 393-407) also consists of generalized remarks about the difficulties of poverty and the psychological attitudes of the poor which have only the most tangential relationship to section 131 (11).

The emphasis on psychological attitudes in those essays is in contrast to the findings of the Bureau of Labor Statistics in *Work Attitudes of Disadvantaged Black Men* (1972) (Pl. Ex. H, A. 422-33) that there was relatively little difference in attitude expressed by persons who had participated in the labor force in different degrees. People who worked steadily seemed to have the same attitudes as non-participants.

The Bureau of National Affairs' 1970 survey, *Turnover and Job Satisfaction* (Pl. Ex. G, pp. 408-21) reports executives' opinions about prevention of turnover and promotion of job satisfaction; it does not address the situation where an employee quits without being able to support himself for even a short period of time, which is the subject of this action.

The excerpts from W.G. Bowen and T. A. Finnegan, *The Economics of Labor Force Participation* [Princeton U. Press 1969] pl. Ex. A, A. 383-92) examine the impact of "other income", which category includes public assistance payments, on the study group of "prime age males". The relevant findings were but a "hunch" (*id.* at A. 386-7):

> "It hardly seems likely that men between 25 and 54 years of age *who were able to earn a good income* by participating in the labor market would choose not to participate because they received somewhere between $1,000 and $3,000 per annum from other sources —it takes more money than this to qualify as a member of the idle rich! It seems more likely that most of the men receiving $1,000-$3,000 of other income and not participating in the labor force are men who would have had difficulty finding employment, and that if they had found jobs they would not have commanded large salaries. In short, our hunch is that the possession of small amounts of other income serves mainly to permit some prime-age males who would otherwise have had a tenuous place in the labor market to stay out altogether."

That "hunch" is not entitled to the same weight as fact-finding by the legislature. See *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969).

However, the findings do support the utility of limiting public assistance benefits to persons who do not voluntarily terminate their employment for the purpose of obtaining such benefits because there are people who do not "command . . . large salaries". The same study found that in the early 60's high expenditures on public assistance per capita was not correlated with a lower participation

in the labor force among prime age males (Pl. Ex. E, A. 391-2). The authors do not claim that this statistic has any predictive value for persons applying for public assistance shortly after voluntarily terminating employment.

The short excerpt from the foreword of Leonard Goodwin, *Do the Poor Want to Work? A Social-Psychological Study of Work Orientations* (Brookings Institute, 1972) (Pl. Ex. I, A. 434-8) expresses skepticism about the ability to find jobs for and train "welfare mothers". In such an economic climate, it is all the more important for those who have jobs to hold on to them until they find new employment.

Thus these non-legal materials submitted by appellees and relied on by the District Court do not support the finding that the rebuttable presumption was arbitrary. None of them deals with the facts giving rise to the presumption. In any event, they furnish no support for overruling the Legislature's finding that such a provision would advance state policy.

Indeed, appellees' materials address themselves more to the broader purposes of the work programs which have been enacted by Congress and various state legislatures including New York's. Yet this Court specifically upheld New York's work rules against an attack that they were pre-empted by Congress's WIN programs. *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405 (1973). The broad purposes of both federal and state statutes were held to be within the legitimate purview of legislation in contrast to the holding below. This Court held (413 U.S. 405 at 413) that invalidation of New York's program:

> ". . . could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. New York has a legitimate interest in encouraging those of its citizens who can work to do so, and thus contribute to the societal well-being in addition to their personal and family support. To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly intetrfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution".

This Court has already approved the validity of the legislative purpose of New York's work rules. Section 131(11) is a necessary part of that program.

G. The Enactment of This Presumption Was a Proper Exercise of Legislative Power

This Court recognized the primacy of legislative policy with regard to promoting employment and limiting State expenditures to those "genuinely incapacitated and most in need" in *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 413. Generally, in the field of welfare, this Court has wisely stayed its hand. In *Dandridge* v. *Williams,* 397 U.S. 471, 487, the Court declared (1970):

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."

Also see *Jefferson* v. *Hackney,* 405 U.S. 535 (1972). Cf. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 33-4 (1973), which relied on the same principle in the context of State educational finance policy.

The Court below rejected these decisions as irrelevant because they dealt with the right to equal protection of the laws (Op. A. 573). The District Court is unique in its view that there is a clear line between due process and equal protection analysis. This Court has confronted them as overlapping and difficult to distinguish. *Weinberger* v. *Salfi,* —— U.S. ——, 45 L. ed. 2d 522 (1975); *Mobile, J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35, 43 (1910); *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S . 8, 18-19 (1931) *Jiminez* v. *Weinberger,* 417 U.S. 628, 638 (1974) (Rehnquist, J. *dissenting*); *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 652 (1974) (Powell, J. *concurring*).

In reversing the District Court's holding that the duration-of-relationship provisions of the Social Security Act violated the *due process clause* of the Fourteenth Amendment, this Court held that it created a rational classification in conformity with the *equal protection clause. Weinberger* v. *Salfi, supra.* The Court emphasized the ability of appellants to present evidence ". . . that they meet specified requirements" as support for the use of equal protection analysis (45 L. ed. 2d 522 at 543). Appellees here also can present evidence. They even can rebut the presumption. Therefore, the equal protection standard of rationality could be used here, as well.

The Constitution requires deference to legislative findings whether an attack on a statute is based on the due process or equal protection clauses. In *Richardson* v. *Belcher,* 404 U.S. 78, 84 (1971), this Court deferred to Congress' power to provide that Workmen's Compensation benefits be offset against a disability claim under the Social Security Act and upheld the provision as not violative of the claimant's right to due process of law.

The eloquence of Mr. Justice Black in upholding a Kansas criminal statute regulating "debt adjusting" against a claim of denial of due process is still persuasive, despite its familiarity. *Ferguson* v. *Skrupa,* 372 U.S. 726, 729-30 (1963):

> ". . . Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis.
>
> • • •
>
> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws . . ."

Judge Frankel exercised similar judicial restraint in refusing to enjoin the enforcement of state statutes obligating recipients to repay the Welfare Department for past assistance. *Snell* v. *Wyman,* 281 F. Supp. 853, 862, 863 (S.D.N.Y. 1968), affd., 393 U.S. 323 (1969). The due process rationale of *Snell* was specifically approved by this Court in *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

POINT II

The simple procedures for rebutting the presumption in the local social services office and at the State fair hearing guarantee due process of law especially because the facts which rebut the presumption are wholly within the applicant's knowledge and control.

Plaintiffs and the Court below deemed the presumptions contained in NYSSL § 131(11) not only unsupported by reason—a conclusion disproved in Point I, *ante*—but burdensome to rebut, particularly because the opportunity to rebut is allegedly delayed. That view of the presumption misconstrues the state regulatory scheme. For the presumption is easily rebuttable, where appropriate, at an early stage and repeatedly thereafter, by evidence within the applicant's control; and the presumption creates no special burden of proof, for even without it the applicant has the burden of establishing his eligibility. To these considerations we now turn, after a brief summary of the administrative procedure of which the presumption is a part.

The presumption contained in NYSSL § 131(11) first arises when a person applies for public assistance within 30 (for AFDC) or 75 (for HR) days after quitting his job. The applicant is required to (18 NYCRR § 351.1(b)(2), *post* at p. 1a):

> "(i) provide accurate, complete and current information on his needs and resources as well as the whereabouts and circumstances of responsible relatives;
>
> "(ii) furnish evidence to provide verification of those factors which affect eligibility and the amount of entitlement . . ."

If, like plaintiffs, he is an applicant for Home Relief (NYSSL § 158[a] [*ante* at p. 6]) and capable of self-

support,* he has the responsibility (18 NYCRR § 370.4(a), *post* at p. 7a):

> ". . . to provide verified information concerning his previous maintenance, loss of income and the extent and duration of current need."

It is to be expected that a recently employed applicant for public assistance, particularly for HR, will bring to the local agency evidence of that recent employment, of the income received and of the termination of that employment. If the applicant is applying within the periods specified by 18 NYCRR § 385.7, he will be asked why he terminated his previous employment. If he did not intend to apply for public assistance at the time, his explanation, corroborated by the data proving facts related to his income, would be enough to overcome the presumption. See 18 NYCRR §§ 351.5-351.6.

State-issued guidelines for ascertaining whether termination of employment was for the purpose of qualifying for public assistance refer local agency staff to 18 NYCRR § 385.6(c)** (dft. aff., A 447, dft. Ex. A, 454-5) for examples of reasons for quitting jobs for purposes other than qualifying for public assistance (dft. aff., A. 447-8; Ex. A, A. 454). Those reasons include (18 NYCRR § 385.6 [c] [dft. aff. 447-8]):

> ". . . the salary or wages was less than the minimum required by law, the conditions of employment were otherwise contrary to law, or the wages or compensation or hours or conditions of work offered are sub-

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* Disabled persons were eligible for Aid to the Aged Blind and Disabled (AABD). See former 42 U.S.C.A. § 1381 *et seq.*, former NYSSL Titles 6-9, §§ 207 *et seq.* Since January 1, 1974, they have been eligible for Supplemental Security Income 42 U.S.C.A. § 1381 *et seq.*, NYSSL §§ 207-12.

** That section deals with good cause for refusal to accept employment.

stantially less favorable to the applicant or recipient than those prevailing for similar work in locality;

"a strike, lock-out or other industrial controversy was in progress at the place in which employment was offered;

• • •

"the job would have been hazardous to the applicant's or recipient's life or health, or there was an absence, if appropriate, of workmen's compensation;

"the place of employment was an unreasonable distance from the applicant's or recipient's home;

"transportation by public carrier or by private means between the applicant's or recipient's home and the place of employment was unavailable;

"child care plans were temporarily disrupted making it impossible for the applicant/recipient to report as required; or

"temporary and verified illness incapacitated the client." (enumeration omitted).

Appellant's informational letter further emphasized (dft. Ex. A, A. 445):

> "Local districts, of course, should not consider this list as exhausting the possibilities under which a voluntary or provoked discharge is not subject to sanction, but should continue to exercise reasonable discretion, considering such factors as the lapse of time between termination of employment and application for assistance, attempt to resolve the differences with the employer which led to termination, ability to verify reasons alleged for termination, etc."

Local agencies also issue guidelines for enforcing the presumption. The New York City Human Resources Administration which administers New York's largest Social Services District has such a guideline, issued in January,

1972 (IM #14/72, dft. Ex. B, A. 456-8), giving examples of reasons for terminating employment which, if proven, would demonstrate a purpose other than qualifying for assistance (A. 457-8):

> "a. Harassment by employee's supervisor;
>
> "b. Discrimination because of race, sex, age or religion;
>
> "c. Expectation of another job that did not materialize;
>
> "d. Conditions on the job or on the way to the job that posed a danger or hazard to the employee;
>
> "e. Family moved to a location which made the job an unreasonable distance away;
>
> "f. Child care plans were disrupted;
>
> "g. Verified illness forced resignation;
>
> "h. Strike or industrial controversy caused resignation."

The local social services agency still has the duty to determine whether, in fact, the applicant terminated his employment for the purpose of obtaining public assistance under NYSSL § 131(11). This determination would have to be made even if the District Court's opinion were affirmed, since it was only the clause establishing the presumption which was invalidated, not that establishing the period of ineligibility for persons who voluntarily terminated their employment for the purpose of obtaining public support.

Aside from NYSSL § 131(11), the local agency has the duty to determine in the case of each applicant for HR (18 NYCRR § 370.4(b), *post* at p. 7a):

> ". . . the source and amount of previous income or maintenance; the reason and date of its discontinu-

ance; presumptive eligibility for benefits relating to loss of income; and employability and availability for employment."

For each applicant, the agency has to explore, verify and evaluate their resources, including income from employment. 18 NYCRR § 351.4(e) (*post* at p. 3a).

Eligibility is determined ". . . as soon as the facts to support it have been established." (18 NYCRR § 351.8(b), *post* at p. 3a). The decision must be subjected to "supervisory review." 18 NYCRR § 351.8(a) (*post* at p. 4a). Except upon the applicant's request or in the face of unusual circumstances, the decision on initial eligibility is made within 30 days. 18 NYCRR § 351.8(b), (*post* at p. 3a). If immediate need exists before eligibility has been established, "an emergency or predetermination grant of assistance shall be made . . ." 18 NYCRR § 351.8(c)(4) (*post* at p. 6a).

Even if assistance is denied, the applicant can reapply on basis of new evidence. If assistance is denied, the applicant has a right to a state fair hearing and to be informed of that right. 18 NYCRR §§ 358.4-358.5. If a fair hearing is requested, he is notified when his hearing is scheduled. 18 NYCRR § 359.2 and at the hearing, he has, among others, the right (18 NYCRR § 358.16[c]):

> ". . . to be represented by counsel, or other representative, to testify, to produce witnesses to testify, to offer documentary evidence, to cross-examine opposing witnesses, to offer evidence in rebuttal and to examine any documentary evidence offered by the other party."

A decision after the State hearing must be rendered within 90 days of receipt of the request for one. 18 NYCRR § 358.18. See *Nelson* v. *Sugarman*, 361 F. Supp. 1132 (S.D.N.Y. 1971).* However in June, the New York

* At the time of the initial decision, HEW rules required a decision in 60 days.

Court of Appeals required appellant to formulate a plan for expedited hearings after denial of emergency assistance (*Jones* v. *Berman*, 37 N Y 2d 42, 55-6 [1975]) which might be available to applicants denied assistance under NYSSL § 131(11) who sought emergency relief. Compare decision below (Op., ns. 5, 6, A. 577-8).

The state fair hearing, itself, can be reviewed in an Article 78 (New York Civil Practice Law and Rules [CPLR]) procedure. See *Sanford* v. *Rockefeller*, 35 N Y 2d 547, 562-3 (1975), *app. dism. sub nom. Sanford* v. *Carey*, —— U.S. ——, 43 LW 3613 (5/19/75).

A. The Flexible Procedures at the Local Welfare Office Which Can be Reviewed at a State Fair Hearing Protect an Applicant's Right to Due Process of Law.

While the District Court held that it did not reach the question whether the applicants were given an adequate opportunity to rebut the § 131(11) presumption (Op. A. 567), the writer of the opinion suggested in the margin that the presumption could only be rebutted at a State fair hearing and that those State fair hearings were not scheduled promptly enough to afford appellees their right to due process of law (Op. ns. 5-6, A. 577-5).

But as we have seen, appellant has the opportunity, indeed the obligation, to present rebutting evidence to the local agency. 18 NYCRR §§ 351.1(a), (b); 351.2(a)-(e)(1); 351.3-351.6(b); 351.8; 370.4(a), (b) (*post* at pp. 1a-7a) and the decision on eligibility is reviewed by supervisory personnel. 18 NYCRR § 351.8(a) (*post* at p. 5a).

These procedures are similar to those employed by the State Department of Labor before suspending unemployeement insurance benefits. The recipient is present at an interview and is given an opportunity to present favorable facts. Those procedures were held to be valid in *Torres* v. *New York State Department of Labor*, 333 F. Supp.

341 (S.D.N.Y. 1971), affd. 405 U.S. 949 (1972).* The procedures at issue in the present case are even less susceptible to attack than those in *Torres,* because the issue to be determined by the Agency is initial eligibility, rather than termination of benefits previously granted. Proceedings to deprive persons of benefits currently enjoyed have sometimes been subjected to special scrutiny. E.g. *Goss* v. *Lopez,* —— U.S. ——, 42 L. Ed. 2d 725 (1975); *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632; *Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Bell* v. *Burson,* 402 U.S. 335 (1971); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Even in cases in which a previously-enjoyed benefit is terminated, a formal pre-termination hearing is not always required. In *Arnett* v. *Kennedy,* 416 U.S. 202 (1974), this Court held that a federal employee could be discharged before he had a trial-type pre-termination hearing. Also see *Torres* v. *New York State Department of Labor,* 333 F. Supp. 341 (S.D.N.Y. 1971), affd. 405 U.S. 949 (1972).

Similarly, the New York Court of Appeals upheld procedures under the "Taylor Law" (Public Employees' Fair Employment Act [N.Y. Civil Service L. Art. 14 § 210]) which placed thousands of New York City employees on nontenure probationary status and fined them two days' pay for each day they had been absent during a strike, before they had been afforded a hearing to determine whether they had participated in the work stoppage. *Sanford* v. *Rockefeller,* 35 N Y 2d 547 (1974), *app. dism. sub nom. Sanford* v. *Carey,* —— U.S. ——, 43 LW 3613 (5/19/75).

Since hearings are not always required, before termination or suspension of benefits, Judge Oakes's implication that a trial-type hearing was required before an *application* for benefits could be denied is certainly unjustified.

* The Court reiterated its previous decision in *Torres* v. *New York State Department of Labor,* 321 F. Supp. 432 (S.D.N.Y. 1971), vacated and remanded 402 U.S. 968 (1971).

It would mean that the mere application for assistance would warrant the granting of it pending the outcome of a fair hearing. This squandering of precious resources is not required by the Constitution.

Since before this suit was brought, appellant had been subject to a permanent injunction governing review of denials of assistance. The Department's performance was being monitored by the United States District Court for the Southern District of New York (*Motley,* D.J.). *Nelson* v. *Sugarman.* See 361 F. Supp. 1132 (S.D.N.Y. 1971) (permanent injunction issued 12/11/73). The injunction required that a fair hearing decision be rendered within 90 days of the request following the denial of an application for assistance. Also see 18 NYCRR § 351.8(a). Because all plaintiffs were members of the class granted the injunction in *Nelson, supra,* the District Court in this case was bound by Judge Motley's determination. Plaintiffs could not be afforded any special consideration in scheduling fair hearings. All other applicants who had been denied assistance for reasons other than ineligibility under NYSSL § 131(11) also claim to be destitute. However, the Court of Appeals' decision in *Jones* v. *Berman,* 37 N Y 2d 42, 55-6 (1975), will provide expedited procedures for reviewing denials of applications for emergency assistance. Any applicant who claims to be in emergent need will be able to have his situation reviewed promptly.

B. The Presumption does not Impose an Onerous Burden of Proof on the Applicant who has the Burden of Proving Eligibilty for Assistance, Even Absent the Presumption.

The applicant for public assistance has the obligation to produce proof of each element of elegibility (*ante* at pp. 44-9). In fact, the presumption contained in NYSSL § 131(11) merely clarifies the duty of the applicant to introduce evidence of his purpose in voluntarily terminating his employment (*post* at pp. 1a-4a, 6a-7a).

Even if the burden of proof is shifted by the use of an evidentiary presumption in a civil proceeding it may be upheld. *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8 (1931); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Mobile J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35 (1910); *Turner Elkhorn Mining Co.* v. *Brennan,* 385 F. Supp. 424 (3-judge Ct. E.D. Ky. 1974), *prob jur.* noted 6/9/75 *sub nom. Dunlop* v. *Turner Elkhorn Mining Co.* (#74-1302) and *Turner Elkhorn Mining Co.* v. *Dunlop* (#74-1316), 43 LW 3644 (6/10/75); *Sanford* v. *Rockefeller,* 35 N Y 2d 547 (1974), *app. dism. sub nom. Sanford* v. *Carey,* —— U.S. ——, 43 LW 3613 (5/19/75).

In criminal cases the shifting of the burden of proof to the defendant has led this Court to invalidate rebuttable presumptions. *Leary* v. *United States,* 395 U.S. 6 (1969); *United States* v. *Romano,* 382 U.S. 136 (1965); *Tot* v. *United States,* 319 U.S. 463 (1943). (See discussion Point ID *ante* at pp. 33-4). The possibility that a presumption will constitute a denial of due process of law is far greater in a criminal conviction than it is in a civil proceeding. A criminal defendant is presumed innocent and the prosecution has the burden of proving each element of the crime. A presumption in that case reverses the burden of proof and the burden of going forward. Accordingly, the standard of rationality which a presumption in a criminal trial must meet is far stricter than that in a civil case. This Court emphasized the special nature of a presumption used in criminal trials in *Leary, supra,* at 35 and at 55 (BLACK concurring) and in *Romano, supra,* at 144.

C. It is Reasonable to Require an Applicant for Assistance to Provide Relevant Evidence Which is Entirely Within his Possession.

The imposition of the presumption on applicants for assistance is particularly appropriate in this instance because the fact to be proved is peculiarly within the knowledge and control of the applicant. It is his intent that is

at issue. His oral statements will frequently be enough to overcome the presumption. Since the applicant has the burden of proving his eligibility, it was reasonable of the Legislature to require him to introduce evidence to prove that he did not intend to be supported by the public after he terminated his employment. Wigmore (*Evidence,* § 2486 at Vol. IX, p. 275 [3d ed. 1940]) states:

> "the burden of proving a fact is said to be put on the *party who presumably has peculiar means of knowledge* enabling him to prove its falsity if it is false. This principle has received frequent application in modern statutes making it an offense to pursue a certain occupation without a *State* license or forbidding a certain act unless in personal circumstances justifying an exception."

Also see *Campbell* v. *United States,* 365 U.S. 85, 96 (1961) (defendant has right to production of statements and reports of government witnesses); *United States* v. *N.Y.N.H. & H.R.R. Co.,* 355 U.S. 253, 256, n. 5 (1957) (carrier has the burden of proving the correctness of its bills); *G.E.J. Corp.* v. *Uranium Aire, Inc.,* 311 F. 2d 749, 751 (9th Cir. 1962) (to defend its option the defendant had the burden of proving the quality of its mines).

The District Court incorrectly rejected this reasoning, stating that it was a "question of policy" (op. A. 572) whether to employ the presumption. Having properly analyzed the issue, the District Court went on to overrule the Legislature's policy and enunciate its own. But the choice of policy whether or not to employ a presumption is the responsibility of the representative branch of government, not the Court.

POINT III

The class action order and injunction were expanded to enjoin provisions relating to AFDC applicants although no plaintiffs were applicants for AFDC and although the provisions involving AFDC applicants were significantly different from those affecting plaintiffs.

The District Court enjoined the provisions of NYSSL (§ 131(11) and 18 N.Y.C.R.R. § 385.7, both with regard to applicants for HR and AFDC (op., A. 569, 574; orders, A. 579-83), although no plaintiff was a recipient of AFDC. The record* before the Court below was silent as to the application of the law to AFDC recipients. There was no evidence that the presumption at issue had ever affected an AFDC recipient. Appellees' original designation of the class would have included only applicants for HR because it refers to a sanction period of 75 days (Compl't, A. 16).

The presumption is triggered in the case of an AFDC applicant only if he applies for assistance within 30 days of terminating his employment. For HR recipients it is 75 days. The Court did not discuss whether an application for assistance within 30, rather than 75, days was a rational basis for the presumption. 18 NYCRR § 385.7 (*ante* at p. 3).

Federal law also places an absolute sanction on applicants for AFDC-U, making the whole family ineligible for assistance for 30 days after the father's employment terminated, whether or not he quit or was fired and no matter what the reason for termination. 45 CFR § 233.100 (a)(3)(i), (ii). The holding of the District Court invalidated a presumption which, if not overcome, would render

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* The only discussion of AFDC recipients before the District Court was contained in the memoranda submitted in support of the counter-orders.

an applicant ineligible for assistance for 30 days. But such an applicant would have the opportunity to overcome it. It is ironic that under unchallenged Federal law that same applicant is subject to an absolute sanction for 30 days with no opportunity for rebuttal.

In its decision, the District Court recognized that the class consisted of only HR applicants (A. 574); but then extended its relief to AFDC applicants, as well (A. 574; n. 7, A. 578; orders A. 579-83). Neither the named plaintiffs nor any other HR applicant has a justiciable interest in the presumption as it applies to AFDC recipients.

The Court below was limited in the scope of its order at least by Article III of the Constitution which restricts judicial power to "cases" or "controversies". Had the Constitution intended to allow the courts to make executive and administrative decisions it would not have so limited their power. But this limitation is a necessary concomitant of the separation of powers.

In *SCM Corporation* v. *Radio Corporation of America,* 407 F. 2d 166 (2d Cir. 1969), *cert. denied* 395 U. S. 943 (1969), the Court held that the defendant could not counterclaim on the basis of injury to its licensees. *Id.* at 170. In so holding it stated a rule whose analogue is applicable to this case as well:

> "Standing to sue was not given by Congress to any and every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior. Congress properly bestowed the right to sue only on such persons as might be injured in their business or property *by reason* of anything forbidden in the antitrust laws." *Id.* at 171.

For plaintiffs to be afforded relief not in their own interest is contrary to the basic function of the judicial office of the Courts in this country. *Tileston* v. *Ullman,* 318

U. S. 44 (1943). It has frequently been held that parties cannot agree to bring a test case (*Poe* v. *Ullman*, 367 U. S. 497 [1961]), nor can they seek tc attack an entire statute where their rights have not been infringed by all of its provisions. *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443 (1938).

The District Court here was not called on to adjudge the legal right of any applicant for AFDC. Instead it found what it thought to be a violation of a technical statutory requirement in the abstract and overreached to resolve a potential controversy not before it.

This is contrary to the teaching of *De Funis* v. *Odegaard*, 416 U. S. 312 (1974) and *Golden* v. *Zwickler*, 394 U. S. 103 (1969), in which fortuitous circumstances mooted plaintiffs' claims. Nonetheless, this Court held that they could not continue their suits raising very interesting constitutional questions. At the very least, a justiciable controversy must be one presented ". . . in the context of a specific live grievance". *Golden* v. *Zwickler, supra*, at 110.

This limitation on the judiciary is especially strict when the validity of a state statute is at stake, e.g., *Golden* v. *Zwickler, supra*. As this Court analyzed such a question (*Poe* v. *Ullman*, 367 U. S. 497, 503-504):

> "The various doctrines of 'standing,' 'ripeness,' and 'mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own 'varied application'—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action."

In *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners*, 113 U. S. 33, 39 (1885), this Court held that the judiciary does

not have the power to declare a state statute void:

> "except as it is called upon to adjudge the legal rights of litigants in actual controversies."

In *Muskrat* v. *United States*, 219 U. S. 346 (1911), this Court explained the delicate relations among the organs of government when the validity of a statute is brought before a court (*Id.* at 361):

> "The right to declare a law unconstitutional arises because of an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy', to which, under the Constitution of the United States, the judicial power alone extends."

Similarly, here the decision that provisions of the State statute relating to AFDC applicants are in violation of the Constitution is not presented in a "controversy" between plaintiffs and defendants.

CONCLUSION

For the foregoing reasons, the final judgment and order of the three-judge District Court should be reversed and summary judgment granted to appellant.

Dated: New York, New York, Sept. 3, 1975.

Respectfuly submitted,

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APPENDIX

NYCRR

Title 18 Regulations of the N.Y.S. Department of Social Services

PART 351

Investigation and Eligibility

Section 351.1 Investigation. (a) *Definition.* Investigation is a continuous process which is concerned with all aspects of eligibility for public assistance or care from the period of initial application to case closing. Investigation means the collection, verification, recording and evaluation of factual information on the basis of which a determination is made of eligibility and degree of need, or of ineligibility, for any form of public assistance or care.

(b) *Responsibility for furnishing information.* The social services official shall:

(1) provide applicants and recipients, and others who may inquire, with clear and detailed information concerning programs of public assistance, eligibility requirements therefor, methods of investigation and benefits available under such programs;

(2) inform each applicant and recipient, at the time of application and subsequently, of such person's initial and continuing responsibilities to:

(i) provide accurate, complete and current information on his needs and resources as well as the whereabouts and circumstances of responsible relatives;

(ii) furnish evidence to provide verification of those factors which affect eligibility and the amount of entitlement including:

(a) identity;

(b) residence;

(c) family composition;

(d) rent payment or cost of shelter;

(e) income from any source;

(f) savings or other resources; and

(g) lawful residence in the United States, if the recipient is an alien.

(iii) apply for and utilize any benefits or resources that will reduce or eliminate the need for public assistance or care; and

(iv) notify the district of any changes in his needs and resources.

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351.2 Aspects of investigation and eligibility. (a) *Identity.* The applicant or recipient shall furnish verification of his identity.

(b) *Residence and cost of shelter.* Place of residence and rent payment or other shelter costs of the applicant or recipient shall be verified.

(c) *Family composition.* For each member of the household for whom an application for assistance is made the following information shall be furnished: name; date and place of birth; relationship to other members of the household; social security number, veteran status; activity status; marital status if 16 years of age or over; if any person is pregnant, the anticipated date of delivery; and if the applicant is employed, the expenses incident to such employment. For all members of the household not applying for assistance, the name and relationship to those applying for assistance shall be furnished.

(d) *Need.* Consideration shall be given to individual and family requirements for all items of need and any changes in such requirement for need in accordance with department regulations.

(e) *Resources.* Resources include individual or family financial assets, income from employment, eligibility for or receipt of benefits, and the services and social resources available through family relationships and community programs. Resources shall be explored, verified, and evaluated as to their immediate and/or potential availability to remove or reduce the need for public assistance.

(1) *Financial resources.* Each financial asset or resource immediately or potentially available to the applicant or recipient shall be identified and shall be explored to determine its nature, amount, form and availability. Each such resource shall be evaluated and a decision reached in regard to its utilization. Such resources include but are not limited to: employability, earnings, work related benefits, pensions, health insurance, small business, real and personal property, securities, cash on hand, bank accounts, insurance, trust funds, estate settlements, servicemen's benefits, income in kind, contributions from relatives and friends, support orders and any other benefits or interest in real or personal property.

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351.5 Sources of information. (a) *Primary sources.* The applicant, recipient, members of his household and public records shall be relied upon as primary sources of information. Information received from applicants, recipients, and members of the household shall be verified. The applicant or recipient shall be required, wherever possible, to provide such verification by documentation.

(b) *Secondary and collateral sources and collateral investigation.* Secondary or collateral sources of informa-

tion are relatives outside the immediate family group, and other persons, agencies, or resources. Collateral investigation means the collection of additional information through contacts with secondary sources such as relatives, employers, banks, insurance companies, school personnel, social agencies, and other appropriate individuals and organizations.

351.6 Verification. Verification of data, which are pertinent to the determination of initial and continuing eligibility or the amount of the assistance grant are essential elements of this investigation.

(a) Documents, personal observation, personal and collateral interviews and contacts, reports, correspondence and conferences, are means of verification.

(b) When information is sought from collateral sources other than public records because the applicant or recipient cannot provide verification, there shall be a clear interpretation to the applicant, recipient or legally responsible relatives of what information is desired, why it is needed, and how it will be used.

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351.8 Decision of initial eligibility and payment of assistance grants. (a) Decision on initial eligibility is the conclusion or determination reached at any point in the application process. Such decision, as approved on supervisory review, shall constitute the decision of the social services official. The decision shall be one of the following:

(1) *Accepted for assistance.* This means that eligibility has been fully established through investigation or that emergency need and presumptive eligibility has been established and authorization for assistance has been made and approved by the social services official.

(2) *Not accepted for assistance.* Applications are denied and not accepted for assistance when:

(i) In the course of the application interview the information given by the applicant establishes, without the need for further investigation, that he is ineligible.

(ii) Ineligibility is determined in the course of or upon completion of the investigation, or if the applicant refuses to comply with any requirement essential to the determination of eligibility.

(3) *Terminations without decision.* No decision is required when:

(i) An application is withdrawn by the applicant.

(ii) The social services official documents that the applicant has died, cannot be located, or has left the district prior to the completion of the investigation.

(b) The decision to accept or deny the application shall be made as soon as the facts to support it have been established by investigation but not later than 30 days from the date of application except where the applicant requests additional time or where difficulties in verification lead to unusual delay, or for other reasons beyond the social services official's control. The applicant shall be notified in writing of the decision in accordance with department regulations. The reason for delay shall be recorded in the case record and communicated to the applicant.

(c) (1) When eligibility has been established the application shall be accepted for assistance pending the development of potential resources i.e., support from relatives, adjustment of insurance, or eligibility for benefits. It shall be the responsbility of the social services official to fully explore and develop all such resources.

(2) When eligibility has been established, payment of the regularly recurring grant shall ordinarily be made effective as of the date of application.

(3) A first payment shall be made as soon as possible but not later than within 30 days of the application.

(4) When eligibility has not been established but immediate need is determined to exist, an emergency or predetermination grant of assistance shall be made in accordance with department regulations.

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PART 370
Home Relief

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370.4 **Financial requirements.** [Additional statutory authority: Social Services Law, § 58] Persons who are unable to provide financially for themselves, who are unable to secure support from legally responsible relatives or other source, who are not receiving needed assistance or care, and who are not eligible or presumptively eligible for AABD, ADC, or not eligible for EAF shall be eligible for home relief. Home relief includes assistance granted to veterans under existing laws, but does not include medical assistance, foster care of children, or care classifiable under the law as public institutional and other adult institutional care. Eligibility shall be determined for each application in accordance with applicable regulations of the department and in accordance with the principles stated above. The initial determination shall include consideration of each of the following factors which are related to eligibility and which are pertinent to the issuance of the home relief grant in the form and frequency required in the individual circumstances:

(a) *Responsibility of applicant.* Insofar as practicable, responsibility shall be placed upon the applicant for home relief to provide verified information concerning his previous maintenance, loss of income and the extent and duration of current need. Both the method and content of investigation shall be aimed at assisting the applicant to return to self-support and fully utilize resources related thereto.

(b) *Previous maintenance and reason for application.* For each member of the household applying for assistance, the following shall be determined: the source and amount of previous income or maintenance; the reason and date of its discontinuance; presumptive eligibility for benefits relating to loss of income; and employability and availability for employment. If the applicant is in need of medical assistance only, the application shall be taken for MA in accordance with applicable board rule and department regulation.